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## Because All the World Was Not New York City: Governance, Property Rights, and the State in the Changing Definition of a Corporation, 1730-1860

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BECAUSE ALL THE WORLD WAS NOT NEW YORK CITY:  
GOVERNANCE, PROPERTY RIGHTS, AND THE  
STATE IN THE CHANGING DEFINITION OF  
A CORPORATION, 1730-1860

HENDRIK HARTOG\*

INTRODUCTION

There is a standard history of the corporation in American legal history. Until the early years of the 19th century, it is said, all corporations were public institutions—derivative agencies of the state. Capitalists and legislators copied city charters—grants of public power—to create an American business corporation. The supposed attractions and advantages of corporate form—chiefly, limited liability and the “fiction” of corporate existence—were neither available nor necessarily of interest to businessmen of that period, and the only real advantage offered by the state-chartered corporation over other ways of organizing business was its very creation by state government. Entrepreneurs wanted to attach themselves to the interests of the mercantile state.<sup>1</sup>

The modern private corporation is therefore said to be the child of a narrowly public form of organization. Reaching maturity in the second fifth of the 19th century, it wrapped itself in the contract clause and made for itself a rich—and autonomous—future. Public corporations, on the other hand, drifted on in senile dependency, mere “administrative subdivisions” of the state.<sup>2</sup>

This is the conventional wisdom, a wisdom that unites neo-marxist with new dealer, institutionalist with historian of doctrine. Yet, we do not know what it meant to be defined as a “public” corporation in 18th century America. What sort of autonomy, what

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1. See E. DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* (1954); O. HANDLIN & M. HANDLIN, *COMMONWEALTH* (rev. ed. 1969); L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1760-1860*, at 111-14 (1977); J. W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* (1970); Handlin & Handlin, *The Origins of Business Corporation*, 5 J. ECON. HIST. 1 (1945).

2. O. HANDLIN & M. HANDLIN, *supra* note 1, at 236.

sort of free enterprise, was implied or expressed in an 18th century charter? The history of the corporation has been written as the history of the emergence into "privateness" of a formerly public institution. But what was so "public" about a municipal corporation in either 18th or 19th century America that allows us to differentiate it from the "emergent" business corporation? This article sketches out one possible answer to these questions, using New York City as a case study. But more fundamentally, this article should stand as a provocation, as a challenge to the easy assumption that words mean what we think they mean.

### I. THE CONCEPT OF A MUNICIPAL CORPORATION

Well before the Civil War, perhaps as early as 1830, New York City had become, legally speaking, a municipal corporation. To a modern lawyer, such a statement may seem tautological. What else, legally speaking, could a city be if not a municipal corporation? But, until the beginning of the 19th century New York City had been something else. The chartered corporation of mid-18th century New York City was not municipal in character, at least as the term "municipal" was understood in mid-19th century American law. It was a member of no statutory category of public corporation, but rather was a singular institution established to serve a particular local constituency.

What then is a municipal corporation?<sup>3</sup> In the manner of a dogmatic 19th century judge we might begin as follows: An American municipal corporation is a public corporation created by a state legislature for the purpose of providing a government for a city or town. As a public corporation, it lacks the contractual guarantee of independence that characterized the private corporation after the *Dartmouth College* case.<sup>4</sup> Its charter is not simply the legislative document that created it; rather its "charter" is usually seen as the sum of all the legislative determinations affecting its existence. (For New York City this meant a document that by 1882 was somewhat larger than the entire French Civil Code.<sup>5</sup>) The rights and powers of a municipal corporation cannot be fixed; they do not vest in the corporation against the state—nor against

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3. See H. Hartog, *The Creation of an American Municipal Corporation: 1820-1870* (1974) (unpublished manuscript).

4. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 517 (1819).

5. M. KELLER, *AFFAIRS OF STATE* 115 (1977).

private individuals. A municipal corporation is whatever the state legislature says that it is, and it does whatever the state legislature says that it can do.<sup>6</sup> Municipal corporations have a limited "capacity" to act and be bound by private contracts.<sup>7</sup> "[B]ut independently of that power . . . they have no more authority to make such a grant than any other administrative board in the state."<sup>8</sup>

We might well question the accuracy of this definition. What is "municipal" about an administrative agency of the state? And what can we say about a "corporation" that has no personality except such as the legislature deigns to grant it—that it seems to be a little other-directed? We might, in fact, want to argue that a better definition of a municipal corporation would emerge from a consideration of the corporation as the government of a town or city rather than as the agent of the state. A municipal corporation, after all, ought to be regarded as the embodiment—the incorporation—of the locality, as the legal entity that stands for the community.<sup>9</sup>

In the mid-19th century, however, municipal corporations were not viewed in that light. The notions of a "corporation of a city" and a "municipal corporation" were not precisely synonymous. Today, "municipal" is used in common parlance to substitute for a city name, or to describe a city institution.<sup>10</sup> Yet even today both the *Webster's Dictionary* and the *Oxford English Dictionary* define the word "municipal" in very different terms: "of or relating to the internal affairs . . . of a nation."<sup>11</sup> Through the first two-

6. Consider, for example, the Wisconsin case of *Dean v. Charlton*, 23 Wis. 590 (1868), in which the city of Madison was forbidden from paving its streets with an improved, patented process called Nicholson Pavement because its charter required that all contracts should be let out by auction to the lowest bidder. *Dean* was later limited to its facts by *Kilvington v. City of Superior*, 83 Wis. 222, 53 N.W. 487 (1892).

7. "Like a state, it has its public duties and its private rights." Some municipal duties are not duties of the sovereign, but rather are undertaken as a private citizen. And as such, a municipal corporation can be held to its contractual obligations. *Western Sav. Fund Soc'y v. City of Philadelphia*, 31 Pa. 175, 182 (1858).

8. *Davis v. Mayor of New York*, 14 N.Y. 506, 523 (1856).

9. "A corporation is properly an Investing the People of the Place with local Government thereof, and therefore their Laws shall be binding to Strangers; but a Fraternity is some People of Place united together in Respect of a Mystery and Business into a Company, and their Laws and Ordinances cannot bind Strangers, for they have not a local Power." G. JACOB, *A NEW LAW DICTIONARY* (5th ed. 1744); see also the conclusion of Thomas Madox's early English essay on the legal structure of cities: "There were several advantages which a Corporate-Town had over a Town not-corporated. The encorporation fitted the Townsmen for a stricter Union amongst themselves, for a more orderly and steady Government, and for a more advantageous course of Commerce . . ." Madox, *Firma Burgi* 295-97 (1726).

10. BLACK'S LAW DICTIONARY 1168 (4th ed. 1968).

11. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1487 (1967); *accord*, 6 OXFORD ENGLISH DICTIONARY 767 (rev. ed. 1961).

thirds of the 19th century it was exclusively in this sense of internal state law that the term "municipal law" was used. As such, it became a category of great utility to American law writers. Chancellor Kent, for one, presented his strongest arguments for judicial review of legislation and the necessity for a "reception" of English common law in a section of his *Commentaries* entitled, "Of the Various Sources of the Municipal Law of the Several States."<sup>12</sup> John Norton Pomeroy, for another, called his Civil War era primer on American law *An Introduction to Municipal Law*.<sup>13</sup> In neither case was there any mention of laws or rules relating to local government.

Etymologically, of course, the word "municipal" does derive from the Latin word for city. But, as the first edition of *Bouvier's Law Dictionary* explained, the significance of the word lay not so much in its reference to a city as in its reference to a single legal and political jurisdiction. Cities joining the Roman republic were said to retain "their laws, their liberties and their magistrates." So, said the dictionary writer, Americans applied to the term a "more extensive meaning: for example, we call *municipal law* not the law of a city only, but the law of the state."<sup>14</sup>

The idea of a "municipal law" encompassed two central notions of 19th century public law: the uniformity of law within a jurisdiction and the supremacy of the state as a source of power and authority. Both of these notions helped shape the way Americans thought about municipal corporations in the years after 1835 when the term "municipal corporation" began to come into general legal use.<sup>15</sup> As the law of municipal corporations developed,

12. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 419-38 (1st ed. New York 1826).

13. J. POMEROY, AN INTRODUCTION TO MUNICIPAL LAW (New York 1864). See also 1 J. BOUVIER, INSTITUTES OF AMERICAN LAW 6 (Philadelphia 1851).

14. BOUVIER'S LAW DICTIONARY (Philadelphia 1839).

For Blackstone, who may have invented modern Anglo-American usage of the term, "municipal law" stood for an English equivalent of the *jus civile* of the Continent (or what later English lawyers would call "positive law"): "I call it *municipal law*, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws and customs." Municipal law, as Blackstone repeated almost interminably, is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." 1 W. BLACKSTONE, COMMENTARIES \* 44.

15. The most important source for the growing use after 1835 of "municipal corporation" as a legal category was probably the English Municipal Corporations Act of that year. But see *People v. Morris*, 13 Wend. 325 (N.Y. Sup. Ct. 1835). As late as 1865, *Bouvier's Law Dictionary* had no separate heading for municipal corporation. By the 1890's, on the other hand, dictionary definitions go on for pages, showing the complexity and significance of the subject.

the two characteristics with which that law was most frequently identified were the subordination of local government to state power and the development of abstracted, statewide, public forms of local government. To lawyers like John F. Dillon, local government was everywhere the same. Municipal corporations were institutions that "for purposes of subordinate local administration" were invested with a corporate character.<sup>16</sup> Their powers were limited, dependent, circumscribed, and defined in Dillon's famous rule:

It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the (accomplishment of the) declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable (substantial) doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.<sup>17</sup>

It is worth remembering that in order for there to be rules like Dillon's that limited and defined the exercise of local authority, there first had to be the assertion of governmental authority. As Jon Teaford has written, "[T]he ideal of a diffuse-purpose municipality resulted in an ever expanding range of civic functions."<sup>18</sup> Streets were built, swamps drained, wells dug, aqueducts constructed, police forces hired as cities responded to the unprecedented urban growth of the first half of the 19th century.<sup>19</sup> The physical artifacts of public power were everywhere. From the streets of New York City to the sidewalks of tiny Medina, courts were faced with the legal consequences of governmental action.<sup>20</sup>

At the same time that municipalities were forced to recognize their explicitly dependent status in the polity of the state, those same municipalities created a complex and growing range of public services. A paradox, perhaps. But not one that should trouble us much here. In the political theory of American republican government the very assertion of positive power depended on the ascendancy of the state. Where the people of a state were sovereign,

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16. 1 J. DILLON, MUNICIPAL CORPORATIONS 96 (2d ed. 1873).

17. *Id.* at 173.

18. J. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA 115 (1975).

19. Crowther, *Urban Growth in the Mid-Atlantic States, 1785-1850*, 36 J. OF ECON. HIST. 625 (1976).

20. See *Cole v. Village of Medina*, 27 Barb. 218 (N.Y. App. Div. 1858).

local government could act only insofar as it drew on the authority of the whole state, and acted as its agent. Positive governmental authority was always state governmental authority.<sup>21</sup>

## II. PROPERTY RIGHTS, AUTONOMY, AND AUTHORITY

Nineteenth century New York City shared in this conception of the public, dependent, state-centered origins of local government. By the 1850's the traditional legal identity of a chartered city had been transformed. All that remained of the city's traditional property rights was a romantic memory.<sup>22</sup> The city had become an adjunct of a state administrative system. Through the first half of the 19th century, New York City had been the recipient of extraordinary attention from the state legislature, attention that alone would have distinguished it from other local governments. But the effects of that legislation were to supercede the chartered rights and liberties that had once been formative of an autonomous corporate entity. New York City acted, but under mandate of the state. And though physical evidence of its social, economic, and demographic singularity was everywhere, at some deep and significant level of legal and constitutional theory, New York City had become just another municipal corporation—one of many institutions dependent on the state for authority and existence.<sup>23</sup>

One hundred years earlier, the legal existence of New York City had not been tied to any externally defined category of dependent administration. What was to become the municipal corporation of New York was "the Corporation of the city of New York." And, in 1731, that Corporation had been endowed with all of the powers characteristic of an English commercial city or borough.<sup>24</sup> The "Mayor, Aldermen, and Commonalty" of the city were

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21. *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853). See generally G. Wood, *THE CREATION OF THE AMERICAN REPUBLIC* (1969).

22. See M. HOFFMAN, *TREATISE UPON THE ESTATE AND RIGHTS OF THE CORPORATION OF THE CITY OF NEW YORK, AS PROPRIETORS* (2d rev. ed. New York 1862) (1st ed. New York 1853), and compare his sentimentality with the realistic conservatism found in J. KENT, *THE CHARTER OF THE CITY OF NEW YORK* (New York 1836).

23. *People ex rel. Wood v. Draper*, 15 N.Y. 532 (1857); *Davis v. Mayor of New York*, 14 N.Y. 506 (1856); *Mayor of New York v. Furze*, 3 Hill 612 (N.Y. Sup. Ct. 1842); *Bailey v. Mayor of New York*, 3 Hill 531 (N.Y. Sup. Ct. 1842). But see *People ex rel. Bolton v. Albertson*, 55 N.Y. 50 (1863); *Rathbone v. Wirth*, 6 A.D. 277, 40 N.Y.S. 535 (1896).

24. New York City had held earlier charters dating from 1653, 1665, 1686 (the "Dongan Charter"), 1708 (grant of the ferry monopoly); but, the Montgomerie Charter was the first charter to come under Royal seal and was regarded as incorporating all previous charters or grants of authority.

declared to be "one body corporate and politic," able to sue and be sued in all courts and to hold property of any kind: in all ways a free person before the law. The Common Council was empowered to make laws "for the farther public good, common profit, trade, and better preserving, governing, disposing, letting and setting, of the lands, tenements, possessions, and hereditaments, goods, and chattels" of the city, and to enforce its rules with fines and other penalties.<sup>25</sup> Most important of all, the charter confirmed not just the general and autonomous governmental jurisdiction of city authority, but also granted the city an indefeasible and absolute right to much valuable property. The ownership of the "waste and common land" of Manhattan Island (at the time, most of the island north of Wall Street), much of the shoreline of what is now Brooklyn, and the ferry lines between the city and Long Island were all confirmed by the 1731 charter. In addition, the new charter gave the city title to all the land lying under water surrounding the settled city up to 400 feet beyond low water mark. This last grant was in addition to the grant of title to all the waterlots between high and low water mark around the whole island that had been part of an earlier charter, and which the 1731 charter confirmed.

The Montgomerie Charter affirmed the legal and governmental singularity of the city of New York. No other city would have such specific and detailed rights granted to it. The Corporation of the city of New York was a member of no general category of corporation; indeed, we might speculate that a general category of corporation would then have been seen as a contradiction in terms, since a corporation was always defined by stipulated and locally determined rights.

At the same time, the charter of the city did bear a stylistic and structural resemblance to the charters of many contemporaneous British boroughs.<sup>26</sup> What set the Corporation of the city of New York alongside other British corporations (and set it apart from other forms of local government in provincial America) was not its control over trade and commerce.<sup>27</sup> The charter did grant the city substantial powers of regulation over economic relations within the city, but those powers differed only in quantity and emphasis from the ordinary exercise of authority of other forms

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25. See J. KENT, *THE CHARTER OF THE CITY OF NEW YORK* (New York 1851).

26. J. TEAFORD, *supra* note 18, at 3-15.

27. *Id.* at 16-34.



of local government in early modern America.<sup>28</sup> What distinguished the charter of New York City from delegations of power to other local governments was the explicit grant of a sphere of autonomy and instrumental authority defined and described by property rights. As in other governmental entities, the practice of government in colonial New York City was functionally undifferentiated; judicial, administrative, and legislative powers were blurred and diffuse. The property rights confirmed and granted by the Montgomerie Charter gave New York City, unlike most towns and counties, a potential for discretionary decisionmaking that went far beyond the propertyless powers of county justices of the peace or town selectmen.

The wealth granted to the city by the charter freed it from the need to lay regular taxes on the citizens of the city. The fact that the charter had not granted the city an autonomous power of self-taxation—which to us would seem a significant inroad into its autonomy—was really almost irrelevant until the 1760's.<sup>29</sup> If the city had needed to raise revenue by taxation it would have needed direct authorization by the provincial New York legislature. But only on four occasions between 1731 and 1750 was the need for revenue so great that city officers had to seek authorization from the legislature to lay a tax.<sup>30</sup> Rents and other corporate revenues were usually sufficient for the purposes of municipal governance, and one might guess that the existence of "a freely disposable income" gave the Corporation concrete affirmation of its autonomous status.<sup>31</sup>

Fundamentally, property rights gave to the Corporation a form of governmental power unavailable to unchartered local institutions. To understand how that could be so, it is best to begin not with the property rights themselves but with the theory of governance that underlay the exercise of those rights. What was the purpose of government? What was government supposed to do? In 18th century terms, perhaps the best answer to those questions would have been that government ought to do little, that its role was to ensure that others did as they ought to. One would not

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28. See generally Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282 (1976).

29. G. EDWARDS, *NEW YORK AS AN EIGHTEENTH CENTURY MUNICIPALITY* 197-99 (1917).

30. 2 COLONIAL LAWS OF NEW YORK ch. 669 (1739); 3 COLONIAL LAWS OF NEW YORK ch. 711 (1741), ch. 820 (1746), ch. 842 (1746).

31. F. MAITLAND, *TOWNSHIP AND BOROUGH* 204-05 (1898).

separate public from private action since private individuals were characterized by their public obligations. And the function of government was, as I have described it elsewhere, to enforce the peace—to maintain the order of society by insisting that private individuals fulfilled their public responsibilities.<sup>32</sup>

There was, as a result, little that one could consider direct governmental action or service. Government did not act so much as it ensured and sanctioned the actions of others. The characteristic forms of governmental action were not street cleaners or road building crews; they were ordinances obliging residents to clean the portions of streets abutting their houses or presentments against the selectmen of a town for failing to maintain or repair a highway or, in New York City's case, a lease or grant of corporation property.

In this context of action, or inaction, the property rights granted New York City through its charter allowed it to achieve governmental objectives that were beyond the reach of unpropertied local governments. Instead of mere sanctions against failures of performance, the city could offer leases, licenses, and grants to private individuals willing to support various city-defined goals. New York City did not itself build streets, fill in swampland, or dig wells; the public works projects that characterized 19th century urban governance would have seemed incomprehensible to the city fathers of 18th century New York. But where a county court could only present a town or individual for failing to maintain a street or bridge, New York City's property allowed it to plan and initiate action in a way that did not do violence to the basic premises of 18th century governance.

In one sense, the use of corporate wealth to achieve specific governmental objectives bespoke a kind of fuzziness in the way men and women thought about the nature of public power: "ownership blends with Lordship, rulership, sovereignty."<sup>33</sup> As Mait-

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32. Hartog, *supra* note 28. See also F. MAITLAND, *supra* note 31:

It is long before the community outgrows the old, automatic, self-adjusting, scheme of 'common' rights and duties. Cambridge was very dirty; its streets were unpaved. In 1330 the masters of the University complained to the King in Parliament. What, let us ask, will be the answer to their petition? How ought the town to be paved? Should the municipal corporation let out the work to a contractor, or should it institute a 'public works department'? Nothing of the sort. The mayor and bailiffs should see that every man repairs the road over against his own tenement. That is the way in which the men of Cambridge should pave the town of Cambridge. That is the way in which they will pave it in the days of Henry VIII and of George III.

*Id.* at 79 (footnotes omitted).

33. F. MAITLAND, *supra* note 31, at 11.

land has written, "The 'belongs' . . . of private law begins to blend with the 'belongs' of public law."<sup>34</sup> At the same time, it was a consciously created fuzziness. The New York City Council knew why it was asking for ownership of the waterlots surrounding the city in the 1720's and 1730's.<sup>35</sup> Property rights defined the singular governmental authority of the Corporation of the city of New York.

Consider the waterlots that the city granted to many residents in the years after 1731. To an earlier generation of Progressive historians these grants typified the corruption of the Corporation—an earlier version of the shame of the cities. In a classic study of New York as an 18th century municipality, George William Edwards wrote that "[t]hese transfers were not only short-sighted, but at times even scandalous, for individual magistrates were often questionably involved in the transactions."<sup>36</sup> Relying on an exchange of letters in the *Independent Reflector* in 1753 that seems to indicate the existence of what Milton Klein has called "a shady land deal by which some local businessmen, in collusion with the City Council, planned to get valuable shoreline property for a song,"<sup>37</sup> Edwards and other historians have assumed that there could be no good reason why the Corporation would grant away its rights in the waterlots.<sup>38</sup>

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34. *Id.*

35. It would not be illegitimate to argue that the main reason why the members of the Corporation wanted to secure the new charter was in order to secure the rights to the waterlots. The first time there was any mention in the minutes of the Common Council of the "need" for a new charter occurred in 1722 after Gerritt Vanhorne petitioned the Governor for a grant of "all the Land that may be Gained out of the East River [between Maiden Lane Slip and the end of Wall Street] . . . to Extend into the Said River two hundred foot with Liberty to Erect Buildings Cranes Stairs, &c: And to Receive the Profitts and Wharfage thereof." Given "the great prejudice the Granting thereof may be to the Publick in Generall and this Corporation in particular" the Council decided to petition for a new charter that would include a "Grant of all the Land that might be Gained out of the River . . . with Such Other Privileges Franchises and Immunities as are Usually Granted to Citys & Towns Corporate in England." 3 MINUTES OF THE COMMON COUNCIL 271-72 (Jan. 22, 1722).

In every petition thereafter the waterlots headed the "wish" list of the Corporation. 4 MINUTES OF THE COMMON COUNCIL 5-8, 19-22 (Sept. 17, 1730). It is also relevant to note that Vanhorne was bribed to withdraw his petition to the Governor with a promise that when a new charter was obtained he would get a 400 foot lot instead of the 200 foot lot for which he had petitioned, see 4 MINUTES OF THE COMMON COUNCIL 25 (Sept. 17, 1730); a promise that the Corporation fulfilled in 1734. 4 MINUTES OF THE COMMON COUNCIL 211 (June 28, 1734). See also GRANT BOOK B, Municipal Archives and Record Center, New York City.

36. G. EDWARDS, *supra* note 29, at 150-51.

37. THE INDEPENDENT REFLECTOR 30 (M. Klein ed. 1963).

38. C. BRIDENBAUGH, CITIES IN REVOLT 39 (1955).

But, putting aside the juridical question of collusion and favoritism in the case of specific grants,<sup>39</sup> let us begin by asking what it was that grantees got from the city "for a song."<sup>40</sup> Typically, they got a lot that extended 200 feet into the East River<sup>41</sup> beyond low water mark, which was between 16<sup>42</sup> and 116<sup>43</sup> feet in breadth. And along with title they received the right to charge boats and merchants for dockage, wharfage, and cranage. But, along with title they also accepted a set of highly restrictive and burdensome covenants that ran with the land, and that determined the ways in which the land would be developed. Almost uniformly the city required grantees to build two streets or wharves, one at either end of the length of their lots and each parallel to the river. These streets were to be constructed by the grantees at their own expense, were to be dedicated and applied to the use of the public, and were to be maintained in perpetuity for the benefit of the public and the city by the grantee, his assigns or heirs. Sometimes, additional responsibilities would be added. When in 1758 the Corporation granted to Oliver Delancey a large lot in trust for the children of Sir Peter Warren, the deed included covenants for the construction of a forty-foot-wide wharf or street on the inside boundary of the lot, a forty-foot wharf or street on the outside of the lot, a fifteen-foot wharf to run from Cortlandt Street to the Hudson that would front a slip to be made and left by Delancey, which would itself be dedicated to public use, plus two posts to be put on the latter wharf twenty feet from one another that could be used by boats for docking. Moreover, it was stipulated that "all profits, fees, perquisites, and Emoluments arising or accruing from

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39. It may be that there was collusion and corruption, although my reading of the exchange in the *Independent Reflector* suggests, rather, that the particular dispute was between two groups competing for grant privileges from the corporation, with the loser charging corruption. Even the editor of the *Independent Reflector*, who was hardly one to shy away from criticism of the city's government, seemed at the end to accept the fact that the practices complained of in the first letter were routine and legitimate (although he tried to shift ground to a general critique of the Corporation's manner of giving away property calling it a "Transgression" and a violation of "Duty"). THE INDEPENDENT REFLECTOR, *supra* note 37, at 118-27, 151-56.

40. The following discussion is based on a close examination of all the Corporation deeds held in the collections of the New York Historical Society (about 50 in number), and a more cursory survey of BOOK B of the GRANT BOOKS OF THE CITY held at the Municipal Archives and Records Center, New York City.

41. Until after the Revolution very few grants were made along the Hudson.

42. See, e.g., Corporation Grant to T. Jeffreys, GRANT BOOK B (Apr. 19, 1735), Municipal Archives and Records Center, New York City. See note 40 *supra*.

43. See, e.g., Corporation Grant to S. Farmer, Ellison Family Papers (July 24, 1766), N.Y. Historical Soc'y. See note 40 *supra*.

the wharf or street [running by the slip] shall be taken and received by the Mayor Aldermen and Commonalty" of the city. These covenants had to be satisfied within seven years or the Corporation would repossess; the waterlot would again become part of the estate of the Corporation.<sup>44</sup>

In fact, the terms that the Corporation imposed on grantees were hard and in many cases rigorously enforced. Grantees came before the Common Council to give up their grant because they could not meet the terms of the covenants in the time available.<sup>45</sup> And we might guess that the costs and risks imposed thereby meant that only the most calculating and enterprising merchants would apply for and accept grants from the city.<sup>46</sup>

The point is not that grantees did not benefit from their grants. They applied for the grants, anxiously worked out financing arrangements that would allow them to meet the terms imposed by the city,<sup>47</sup> and by and large abided by those terms for reasons that presumably had something to do with long term economic advantage and gain. But to look only to the private *cui bono* without at the same time considering the benefit to the city and its corporate entity is to lose sight of the calculated ways grants of property could function as an instrumentality of governmental action.

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44. Corporation Grant to Oliver Delancey, Delancey Deeds (Mar. 13, 1758), N.Y. Historical Soc'y. See note 40 *supra*.

45. See 4 MINUTES OF THE COMMON COUNCIL 212 (June 29, 1734) for the petition of Jacob Goellet and Abraham Van Wyck, the executors of the Last Will and Testament of Mr. Andre Teller, who had petitioned for and been granted a waterlot for the use of his daughter. The grant had included a covenant for "Docking Out the same within A Certain Limited time, which Neither the Said Child nor we the Executors are Capable of performing." And the "privilege" of the grant was transferred to Stephan Bayard.

46. In 1772 and 1773 a group of merchants living in the Dock Ward petitioned for a grant of waterlots opposite their properties—between the Exchange and Coenties Slip. The Corporation insisted that any grant was contingent on accepting a covenant to construct a large basin in the middle of the waterlots. And the merchants had to ask for arbitrators to apportion the costs of construction between them. Some of them "would derive greater Advantage from the said Grants than others and of Consequence ought to bear a greater Proportion of the Expence." The arbitrators eventually developed a formula for the merchants that divided both costs and profits of building the basin into 2800 parts. The Basin, according to the grant, was to be left open for 20 years "provided the same shall during the time be found convenient for navigation, of which the said [Corporation] . . . shall be the judges." And at the end of 20 years, when the basin could be filled in, proprietors would have to build a public street across the filled land. See Corporation Grant to James Van Cortlandt, Augustus Van Cortlandt, and Frederick Van Cortlandt, N.Y. City Deeds, Box 8 (Feb. 3, 1773), N.Y. Historical Soc'y; Corporation Grant to Peter Jay, N.Y. City Deeds, Box 8 (Feb. 3, 1773), N.Y. Historical Soc'y; Corporation Grant to Hendrick Remsen, N.Y. City Deeds, Box 8 (July 10, 1772), N.Y. Historical Soc'y; Arbitrators' Report, Box 8. See note 40 *supra*.

47. See N.Y. Historical Soc'y; Arbitrators' Report, Box 8.

If city management in 18th century America was largely defined in terms of the protection and sustenance of commerce, as Jon Teaford suggests, then what waterlot grants offered (and typified) was a way of expanding and developing the commercial heart of the city. To Sam Bass Warner and other historians, such activity might stand as an archetypal example of the kind of "privatism" we so deplore in modern life: the subsidization of private gains by public agencies and the definition of social goals in terms of private advantage.<sup>48</sup> But, from a less anachronistic perspective, what waterlot grants offered, and what they typified in the business of the Corporation of the city of New York, was the possibility of achieving positive governmental goals—paving the streets, developing the harbor—at a time when there was no technology of direct governmental action. How do you get something done if you do not know how, or rather, cannot conceive of doing it yourself? You get someone else to do it for you. In provincial America and in Georgian England most local governments could only get those things done that had always been done, or that had at least always been supposed to be done, since the only sanction available was punishment for not acting. One cannot after all punish someone for not doing what he or she did not know constituted an obligation. On the other hand, a chartered city with substantial property rights could use its wealth to achieve goals—to induce change—through sanctions and rewards, even in the absence of a technology of direct governmental action.<sup>49</sup> And ultimately the singularity of the Corporation was defined by this possibility of change, by the ways in which sovereignty was blurred in the achievement of positive goals.

### III. NEW YORK IN THE NEW REPUBLIC: THE SEPARATION OF PUBLIC AND PRIVATE ACTION

What happened to this singular institution in the years after the Revolution? Waterlot grants continued, although with subtle modifications. In 1791, for example, Alexander Macomb was granted a huge lot between Delancey and Rivington Streets in an area of the city just beginning to undergo rapid development. The

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48. S. WARNER, *PRIVATE CITY* 3-21 (1968). This is not to say that Warner's own analysis of 18th century Philadelphia is not fully appreciative of the complexity and functionality of what he calls "privatism."

49. See N. ROSENBERG, *TECHNOLOGY AND AMERICAN ECONOMIC GROWTH* (1972) for the argument that forms of organizations are a kind of technology.

terms of the grant were complex, but reduced to basics, the city itself proposed to build public slips on either side of this waterlot, and Macomb covenanted to build a street or wharf alongside both slips whenever so required by the Corporation. No completion date was set; the work was made contingent on a decision by the Common Council. More important, instead of requiring him to build a street at the rear of his grant, the deed asserted that "whereas it may or will become necessary for the public convenience that there should be laid out or regulated one or more street or streets leading across the said hereby granted premises" and that these should be taken by the public "without paying therefor," some part of the premises granted should be reserved in advance for streets. Macomb therefore covenanted that he "shall or will not on any pretence whatsoever exact or demand of or from the said [Corporation] . . . any compensation or payment for any such part or parts of the said hereby granted premises as may be deemed necessary or required . . . for the purposes of making, laying out and regulating such street or streets as aforesaid." Macomb could not profit from any taking by the city; but he himself was not obliged to build a street for public use. Street building was becoming a public responsibility, a positive obligation of a public institution.<sup>50</sup>

Other waterlot grants exhibited similar features. It seems to have become routine to require street or wharf construction prospectively. Grantees were to commence covenanted obligations only when so ordered by Common Council ordinance, but not before. Such a practice may simply mean that waterlots were being given out ahead of the demands of city planning. But it presumably also indicated the growing separation of public from private action. Prior to the Revolution, a covenanted grant embodied a public obligation expressed in the private terms of a real estate deed. Now, in the new world of 19th century America, a private deed would serve private purposes, and public action would await public expression.<sup>51</sup>

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50. 9 DePeyster Papers 20 (1791), N.Y. Historical Soc'y. See note 40 *supra*.

51. See, e.g., Corporation Grant to Thomas Ellison, Ellison Papers (Jan. 3, 1804), N.Y. Historical Soc'y; Corporation Grant to George Lindsay, Murray Papers; Miscellaneous Manuscripts M (Feb. 10, 1804), N.Y. Historical Soc'y; Corporation Grant to John McKesson, McKesson Papers, Box 5, 24-40 (Jan. 19, 1808), N.Y. Historical Soc'y; Corporation Grant to J.R. Murray, Murray Papers, Miscellaneous Manuscripts M (Jan. 24, 1814), N.Y. Historical Soc'y; Corporation Grant to Stephan Beekman, N.Y. City Deeds, Box 14 (Mar. 24, 1828), N.Y. Historical Soc'y. See note 40 *supra*.

Over the twenty year period between the end of British occupation and the first years of the 19th century the management of city property remained one of the most important aspects of the business of the Common Council. Waterlots were granted out, the ferry monopoly reaffirmed, markets regulated, stalls leased, and a large portion of the common fields sold off at auction to pay for the accumulated war debts of the city.<sup>52</sup> But however important city property remained in the fiscal structure of city government,<sup>53</sup> it was no longer defined as a continuing instrument of governmental policy. When one half of the upper commons went up for sale in the 1790's, the deeds contained no covenants or restrictions on the fee.<sup>54</sup> Sovereignty and landlordship had parted ways, and the personal authority of the Corporation ended at the point of sale.

But if there was a single symbolic moment when public and private action were wrenched apart, when the Corporation became in the narrow sense a "public" Corporation, it occurred in the 1804 case of *Corporation v. Scott*.<sup>55</sup> The case concerned a dispute over slippage rights to a slip and pier that extended more than 400 feet into the East River; issues of control and governmental authority were complicated by the fact that the covenanted claims of the Corporation went beyond the grants contained in the Montgomerie Charter. The state supreme court declared that the Corporation could have no right to slippage, even if covenanted in a deed and even though the state legislature had specifically authorized the extension beyond the 400 foot limit, because the land on which the pier was erected had never been properly granted to the Corporation<sup>56</sup> (conveniently forgetting of course that the argument might also invalidate the claims of the defendant).<sup>57</sup> The city could not profit from its grant; judgment was given to Scott.

The decision in *Scott* turned on an argument made for Scott by Alexander Hamilton and Robert Troup. Putting aside all considerations of the uses that the city would or would not make of the slip, attorneys Troup and Hamilton baldly asserted that the Corporation could have no beneficial interest in its property. "They were simply trustees, . . . to grant to others a right, in considera-

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52. S. POMERANTZ, *NEW YORK: AN AMERICAN CITY 1783-1803*, at 226-96 (1938).

53. *Id.* at 355-71.

54. *See, e.g.*, Deed and Release to Gilbert C. Willett, Murray Papers, Miscellaneous Manuscripts M (Feb. 25, 1799), N.Y. Historical Soc'y.

55. 1 Cai. R. 543 (N.Y. Sup. Ct. 1804).

56. *Id.* at 548.

57. *Id.* at 546 (argument of Riggs and Harison, in reply, for plaintiffs).



tion of a service or duty performed."<sup>58</sup> Riggs and Harison, counsel for the Corporation, tried in reply to shift the focus of discussion to the "public convenience of the city," which they thought justified an argument that "the acts and grants must be liberally construed" in favor of the Corporation.<sup>59</sup> But the point made by Troup and Hamilton could not be overcome. The property of the city, however the city came by it, was held as a public trust, as a trust presumably for the benefit of the whole public of the State of New York.

In the 1780's the New York State Council of Revision had referred to cities—and particularly New York City—as "independent republics," as autonomous private entities incongruously located within the larger republican polity. In vetoing several acts relating to New York City, the Council did all it could to restrict the city's powers and influence, but the Council still accepted, if reluctantly and resentfully, the city's status as a wealthy, independent, and private corporation.<sup>60</sup>

By the turn of the century, however, New York City was becoming a distinctively public corporation, increasingly dependent on the state for the positive governmental authority that would replace its former wealth as a tool of action and planning. For Chancellor Kent, the moment of decisive transformation might have occurred in 1804 when the state legislature passed a bill increasing the number of wards into which the city was divided. He convinced the Council of Revision to veto the measure as containing "important alterations in the charter" without the consent of the parties to the charter—presumably the "Mayor, Aldermen and Commonalty" of the city of New York. But the legislature went ahead and passed the bill into law over the objections of the Council,<sup>61</sup> and thereby certified the dependent status of the city. From then on, the legislature could and would supersede the charter at will; New York City was a mere creature of the state, a municipal corporation.<sup>62</sup>

For others, the moment of transfiguration might have come with the passage of ordinances like the one passed in 1803 creating

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58. *Id.*

59. *Id.* at 547.

60. A. STREET, *THE COUNCIL OF REVISION OF THE STATE OF NEW YORK* 251-52, 257, 261-64, 266-67, 274-76, 295-98 (Albany 1859).

61. *Id.* at 327-28.

62. See J. KENT, *supra* note 25, at 199-273.

a Department of Scavengers responsible for the disposal of human waste and other garbage that residents left outside their doorsteps. Until then everyone had been responsible for sweeping his or her own offal into the river, and the city had a complicated schedule ensuring that private individuals fulfilled their public responsibilities.<sup>63</sup> Now, in the new world of 1803, human waste disposal—sewage—would be a municipal service, an affirmative undertaking of the city.

In any event, by the 1820's the separation of governmental power from property was certainly complete. Revenue from the city's real estate constituted only a miniscule proportion of the finances of the city. And of that real estate, the vast majority was committed to narrowly public uses: public wharves, piers, slips, ferries, and the actual public buildings of the city.<sup>64</sup> Landlordship was no longer a part of the personality of the city.

More important, city governance was defined as nothing but a delegation of the positive authority of the state. There remained no lingering attachment to government by indirection, to the exercise of "public" power through the manipulation of private rights. Public power, as narrowly conceived, described the personality of the Corporation.

In 1823, for example, the Common Council passed an ordinance proscribing any future interments into the cemeteries of lower Manhattan. Dead bodies were a health hazard in the now-crowded conditions of the old city, and the Council acted under a statute that had specifically authorized municipal control of cemeteries.<sup>65</sup>

The various churches of lower Manhattan sued to reclaim what they considered their vested rights in their cemeteries. Their case rested not only on the usual unjust taking argument of aggrieved property owners but also demonstrated that some of them held their cemeteries as pre-Revolutionary grants and leases from

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63. NEW YORK CITY, NEW YORK, A Law for the Appointment of a Superintendent of Scavengers, LAWS AND ORDINANCES OF THE CITY OF NEW YORK 42 (1805). See also NEW YORK, A Law for cleaning the streets, lanes and alleys of the said city, LAWS, ORDERS AND ORDINANCES 19 (1731); NEW YORK CITY, NEW YORK, A Law for paving and cleaning the Streets, Lanes and Alleys, LAWS, STATUTES, ORDINANCES AND CONSTITUTIONS 28 (1736); NEW YORK CITY, NEW YORK, A Law to regulate the Paving and Keeping in Repair of the Streets, LAWS AND ORDINANCES ORDAINED AND ESTABLISHED 14 (1793).

64. Black, *The History of Municipal Ownership of Land on Manhattan Island*, 1 STUDIES IN HIST. ECON. & PUB. L. 80 (1891).

65. 2 Rev. L. 445, § 267 (1813), cited in *Coates v. Mayor of New York*, 7 Cow. 585, 603 (N.Y. 1827).

the Corporation itself, which had in express covenants guaranteed to them the right of interment.<sup>66</sup> The Corporation, they argued, was estopped from declaring burials a nuisance.<sup>67</sup> And the ordinance was both unconstitutional and a breach of quiet enjoyment.<sup>68</sup>

The courts, however, disagreed. The Corporation, said Chief Judge Savage, "had no power, as a party to make a contract which should control or embarrass their legislative powers and duties."<sup>69</sup>

Sixty years ago, when the lease was made, the premises were beyond the inhabited part of the city. They were a common; and bounded on one side by a vineyard. Now they are in the very heart of the city. When the defendants covenanted that the lessees might enjoy the premises for the purpose of burying their dead, it never entered into the contemplation of either party, that the health of the city might require the suspension, or abolition of that right. It would be unreasonable in the extreme, to hold that the plaintiffs should be at liberty to endanger not only the lives of such as belong to the corporation of the church, but also those of the citizens generally, because their lease contains a covenant for quiet enjoyment.<sup>70</sup>

The courts all agreed that private actions of the Corporation could not limit or control the public governmental authority of the city of New York.

By the 1820's, then, the charter and its vested property rights had become little more than a distant point of origin—almost a historical curiosity—that bore no relationship to the actual practice of government in New York City. The singularity and autonomy of the city as a local government had been obliterated. New York City was a public corporation like other public corporations, a municipal corporation like other municipal corporations.<sup>71</sup>

### CONCLUSION

If this interpretation of the history of authority in New York City is correct, what does it tell us about the general history of the Corporation? Remember, the conventional wisdom assumes that the entrepreneurs of the early Republic were emulating public forms of organization when they looked to city charters as models

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66. *Coates v. Mayor of New York*, 7 Cow. 585 (N.Y. 1827); *Brick Presb. Church v. Mayor of New York*, 5 Cow. 538 (N.Y. 1826). See also *Mayor of New York v. Slack*, 3 Whell. Crim. Cases 237 (Common Pleas 1824), *aff'd*, 7 Cow. 585 (N.Y. 1827).

67. *Coates v. Mayor of New York*, 7 Cow. 585, 592-93, 602 (N.Y. 1827).

68. *Brick Presb. Church v. Mayor of New York*, 5 Cow. 538, 539 (N.Y. 1826).

69. *Id.* at 540.

70. *Id.* at 542. See also *Vanderbilt v. Adams*, 7 Cow. 349 (N.Y. 1827); *Ross v. Mayor of New York*, 3 Wend. 333 (N.Y. Sup. Ct. 1829).

71. See *People v. Morris*, 13 Wend. 325 (N.Y. Sup. Ct. 1835).

of corporate organization. The history of the business corporation has been written as a history of an emergence into privateness (privacy): as the story of how businessmen and legislators only gradually discarded the attributes of public organization and control. But, if the history of the business corporation is described as an emergence into privacy, then the history of the municipal corporation might be read as an emergence into publicness (or publicity), as the story of how cities lost their wealth-created autonomy and became integrated into a centralized system of public authority. The "public" city corporation spawned the private business corporation; the "private" city corporation spawned the public municipal corporation. Both gestations occurred at approximately the same time; yet, they stand in near total contradiction with one another. What sort of magical fish was this 18th century corporation? And how did it produce such differing offspring?

To answer those questions, to resolve that paradox, we shall have to discard our easy reliance on anachronistic assumptions of the mutual exclusivity of public and private spheres of action. Men and women of the first half of the 18th century did not organize the world into the categories common to our experience and to our legal system. They not only thought different thoughts, they thought those thoughts differently. Where we see a legal universe of repressive and mutually exclusive categories of law against politics, substance against procedure, and public against private, it may be that Americans then saw a universe in which the main institutions of social order were integrated and joined in a complex and unstable pattern of authority and hierarchy.<sup>72</sup> Legal discourse did not depend on the preexistence of delimited and dichotomous categories of thought.

And if we would hope to understand the history of the corporation in America, we shall have to discard our easy "Whiggish" assumptions about change and continuity, and our legal language of contradiction and exclusivity. If a corporation was not private, as we understand the term, it does not mean that it was public, as we understand the term. It may be that like the Corporation of the city of New York, corporations could be both things at once, that private wealth and public authority might be integrated in a being whose existence was dedicated to the governance of a complex, commercial community.

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72. For similar arguments, see D. CALHOUN, *THE INTELLIGENCE OF A PEOPLE* (1973); M. FOUCAULT, *THE ORDER OF THINGS* (1971).

